

ADMINISTRATIVE APPEAL DECISION

SKIRP CONSTRUCTION; FILE NO. 200400993

CHICAGO DISTRICT

OCTOBER 13, 2005

Review Officer: Michael G. Montone, U.S. Army Corps of Engineers, Great Lakes and Ohio River Division

Appellant: Mr. Daniel Szkirpan, Skirp Construction

Authority: Section 404 of the Clean Water Act (33 U.S.C. 1344)

Appeal Meeting and Site Visit Date: December 9, 2004

Background Information: On August 2, 2004, Mr. John Sopata of WSI Environmental, (environmental consultant for the appellant) submitted a request for an approved jurisdictional determination (JD) to the Chicago District (District) for lands owned by the appellant. The subject site is an undeveloped parcel, approximately 0.48 acre in area. The lot is located north of 87th Street along the corridor of the proposed extension of 83rd Avenue, in the City of Hickory Hills, Cook County, Illinois.

The request for JD included statements that: no wetland areas were present within the property limits; hydrophytic vegetation was present on site; hydric soils and indicators of hydrology were absent on site. The request for JD also included a single data sheet supporting the above statements.

On August 19, 2004, the District conducted a site visit. On September 15, 2004, the District issued the appellant an approved JD letter stating that his property contained waters of the U.S. including a wetland that drains to the Hickory Hill Reservoir and eventually into the Sanitary and Ship Canal.

The appellant disagreed that his property contained waters of the U.S. and on November 11, 2004, submitted a Request for Appeal (RFA).

The District's administrative record contains: Approved JD letter dated September 15, 2004; the JD decision document dated September 15, 2004; aerial photographs (Cook County, 1999), wetland map (U.S. Fish and Wildlife Service National Wetlands Inventory map, Palos Park, undated); appellant's request for JD dated August 2, 2004; a previous JD letter and decision document for Chicago District JD no. 200200597, dated June 5, 2002, for a project site approximately 500 feet west of the parcel subject to this appeal.

Summary of Decision: The Appellant's Request for Appeal has merit and the approved JD is remanded to the District to include sufficient documentation to support its JD and to reconsider its JD as appropriate.

Appeal Decision Evaluation, Findings and Instructions to the Chicago District Engineer (DE):

Appeal Reason 1: An incorrect application of law, regulation or officially promulgated policy. Specifically, the subject reed canary grass wetland does not include a direct, surface water connection to Waters of the U.S. No direct, surface water connection to the described "Hickory Hills Reservoir" exists, and that reservoir only drains to the Sanitary and Ship Canal through mechanized pumping.

During the appeal meeting, the appellant further clarified this reason for appeal. The appellant's clarifying statements are reflected in Appeal Reasons 1a and 1b. For purposes of this review, Appeal Reason 1 has been split into separate issues and is considered as appeal reasons 1a and 1b.

Appeal Reason 1a: The District incorrectly applied the principles of the 1987 Corps of Engineers Wetland Delineation Manual (1987 Manual). There are no wetlands present on site. The area lacks indicators of hydrology and hydric soils.

Finding: This reason for appeal has merit.

Action: The District's administrative record does not adequately address this issue. The District shall prepare and include in the administrative record a decision document that completely considers the basis for JD and supports its final JD. The District shall complete these tasks within 30 days from the date of this decision, and upon completion, provide the Division office and appellant with its decision document and final JD.

Discussion: During the appeal meeting the appellant stated that information supporting his clarified reason for appeal was submitted to the District with the appellant's request for JD on August 2, 2004. This information is present within the District's administrative record and includes: a single data sheet documenting the absence of wetlands; two photographs collected from the site; and two site location maps.

The District's approved JD letter states that:

Following a review of the information you submitted, this office has determined that the subject property contains 'waters of the United States.' There is a reed canary grass wetland on the property that drains to the Hickory Hills Reservoir and eventually into the Sanitary and Ship Canal. This wetland is under jurisdiction of this office.

The District's documentation supporting its determination that wetlands are present on site is limited to the above language of the approved JD letter and the associated JD decision document. The JD decision document indicates that: based on available information there are waters of the U.S. on the project site; the basis of JD is the presence of adjacent wetlands; the resource documents reviewed; the District conducted a site visit on August 19, 2004; the lateral limits of jurisdiction extend to the ordinary high water mark indicated by the wetland boundary; the

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District does not confirm the wetland boundary. A footnote at the bottom of the JD decision document states that wetlands are identified and delineated using the methods and criteria established by the 1987 Manual.

Use of the 1987 Manual is mandatory to identify and delineate wetlands potentially subject to regulation under Section 404 of the Clean Water Act. In order to identify the presence of wetlands, the 1987 Manual (Part IV, Section D and Part IV, Section D, Subsection 2) requires that adequate information be collected or obtained to complete a routine data form. The District did not prepare a routine data form or include sufficient information in the administrative record to complete one. The District did not provide adequate evidence that the site met the three criteria for wetlands; hydrophytic vegetation, hydric soils, and wetland hydrology. Therefore, the District's assertion that the site contained wetlands is unsupported and this reason for appeal has merit.

Appeal Reason 1b: The District incorrectly applied the principles outlined by the U.S. Supreme Court in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, (SWANCC), 531 U.S. 159, 172-74, 121 S. Ct. 675, 682-84 (2001). A direct, surface water connection (historic or current) does not exist between the alleged wetlands and waters of the U.S. A direct, surface water connection (historic or current) does not exist between the alleged wetlands and the Hickory Hills Reservoir and that reservoir only drains into the Sanitary and Ship Canal through mechanized pumping.

Finding: This reason for appeal has merit.

Action: The District's administrative record does not adequately address this issue. The District shall prepare and include in the administrative record a decision document that completely considers the basis for JD and supports its final JD. The District shall complete these tasks within 30 days from the date of this decision, and upon completion, provide the Division office and appellant with its decision document and final JD.

Discussion:

Surface Water Connection Between the Alleged Wetlands and the Reservoir

During the appeal meeting, the appellant clarified that even if the District correctly applied the principles of the 1987 Manual and areas within the project site contain wetlands, they would not be regulated because a surface water connection does not exist between the wetland and waters of the U.S. Specifically, the appellant disputed the District's statements that a surface water connection exists between the wetlands and the Hickory Hills Reservoir.

As stated earlier, the District's JD decision document indicates the basis of JD is the presence of adjacent wetlands. According to regulations at 33 CFR 328.3(c), adjacency is defined as bordering, neighboring, or contiguous. Therefore, as a matter of practice, adjacency must be based on proximity or a surface water connection. The District did not address proximity and did not document appropriate factors to support a surface water connection between the wetlands and interstate, navigable waters. Therefore, the District's JD is not adequately supported by the administrative record.

In their JD decision document, the District stated that "The 1902 Des Plaines Topographic Map shows a blue line stream that follows the same general course and emptied into the Sanitary and

Ship Canal.” The appellant disputed this fact, asserting that the District based this conclusion on incorrect information. During the appeal meeting, the District and appellant could not agree on the proper location of the project site, but agreed it was reasonable that the District’s initial location used for the approved JD was incorrect. During the appeal meeting, the District also clarified how it used the 1993 U.S. Geological Survey quad map to support that a surface water connection existed. The record lacks this explanation. Most important, the record lacks an overall comparison between the conditions depicted by the 1902 and 1993 resource maps and current site conditions and how this information was used to establish a hydrologic connection.

During the appeal meeting, the District clarified that the following statement (contained within the “Rationale for Basis” section of its JD decision document) was confirmed during their site visit: “Water flows off the site to the east and enters the Hickory Hills Reservoir.” The administrative record lacks this explanation and any notes that document any observations made by the District during their site visit on August 19, 2004. During the appeal site visit, neither a surface water connection, nor obvious indicators of a surface water connection between the wetlands and the Reservoir were observed. The District’s administrative record lacks information characterizing a hydrologic connection or documentation of the District determination that water flowed in this direction and ultimately reached the reservoir. Therefore, the District’s administrative record does not support how the District determined that water flowed from the wetlands and into the Reservoir and this reason for appeal has merit.

Use of a Pump when Establishing a Surface Water Connection

The appellant further stated that even if a surface water connection did exist between the wetlands and the reservoir, it would terminate there due to the presence of mechanized pumps. The appellant and District agree that the Reservoir only drains to the Sanitary and Ship Canal through mechanized pumping. However, the appellant disputes that a mechanized pump can be used to establish a hydrologic connection.

The appellant asserted that the frequency and duration with which the pump is operated should be considered. If the pumps were never, or even seldom operated, water from the wetlands that enters the reservoir might never discharge into the Sanitary and Ship Canal.

The District clarified that the following statement contained with its JD decision document was taken from a telephone conversation with the Director of Public Works for the City of Hickory Hills as documented in JD file no. 200400798: “From [there] the water goes under the Tollway and is pumped into two storm sewers which eventually empty into the Sanitary and Ship Canal.” However, the administrative record lacks this explanation or any notes documenting this telephone conversation and the frequency and duration of pump operation was either unknown or not documented.

There are no Corps regulations or guidance that address the use of mechanized pumps to establish adjacency. However, the Corps failure to specifically identify drainage connections as a measure of adjacency cannot be interpreted as an explicit exclusion of drainage connections as such a measure. *U.S. v. Lamplight Equestrian Center, Inc.*, 2002 WL 360652 (N.D.Ill. 2002). “The Corps regulations define ‘adjacency’ without listing the types of water flow or connections that may constitute adjacency, but instead identify the characteristics of ‘adjacency’ as ‘bordering, contiguous, or neighboring’.” *Id.* (quoting 33 CFR 328.3(c)). The dictionary

definition of “contiguous” is “being in actual contact: touching along a boundary or a point.” MERRIAM-WEBSTER ONLINE DICTIONARY (22 July 2005), *available at* <http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=contiguous&cx=88y=8>. Wetlands could come into actual contact with the tributary by virtue of the path of water, whether it be a delta, a meandering swale, or a drainage connection. However, the District did not provide any support for its assertion of jurisdiction by means of a mechanized drainage connection. Therefore, this reason for appeal has merit.

Appeal Reason 2: Arbitrary, Capricious, and Unpredictable. The Jurisdictional Determination is arbitrary, capricious, and inconsistent with the determination of a similarly situated property approximately 500 feet west of the subject lot. A copy of that June 2002 Jurisdictional Determination (COE # 200200597) was part of the original administrative record and is also attached for your reference. The unpredictability of the subject Jurisdictional Determination when compared to the prior determination of a property also owned by the appellant places an extreme and undue financial hardship on the appellant.

Finding: This reason for appeal does not have merit.

Action: No action required.

Discussion: The appellant submitted a copy of a 2002 approved JD from the District (file no. 200200597) of a property located at 8400 West 87th Street with his request for JD. In 2002, the District determined the absence of waters of the U.S. for the project site associated with file no. 200200597. The property subject to this appeal is located within 600 feet of the project site associated with file no. 200200597.

Jurisdictional determinations must be evaluated on a case by case basis and by careful examination of the site specific conditions. The issuance of a JD does not, in itself, provide substantial merit for a similar JD to be issued. Thus, this reason for appeal does not have merit.

A District may choose to review information from any files, including files located within the same locale or watershed. The District should review all information submitted by the appellant in support of his request for JD. The District’s administrative record contained file no. 200200597 but did not provide an explanation of how this information was used. However, considering the lack of precedent that prior JDs have, the lack of an explanation by the District on this point is harmless since it did not affect the JD.

Appeal Reason 3: Skirp Construction, Inc., respectfully reserves the right to amend its appeal pending the resolution of an appeal related to a third, similarly situated property assigned COE # 200400798.

Finding: This reason for appeal was not accepted for review.

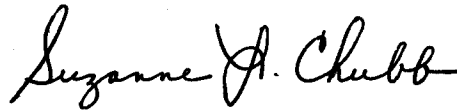
Action: No action required.

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Discussion: As previously stated in the November 22, 2004, Division letter accepting the appellant's RFA, this is not an acceptable reason for appeal per Corps regulations at 33 CFR 331.5(a)(2).

Conclusion: For the reasons stated above, I conclude that this RFA has merit. The approved JD is remanded to the District to include sufficient documentation to support their JD and to reconsider their JD decision as appropriate.

FOR THE COMMANDER:

A handwritten signature in cursive script, reading "Suzanne L. Chubb".

SUZANNE L. CHUBB
Regulatory Program Manager
Great Lakes and Ohio River Division